IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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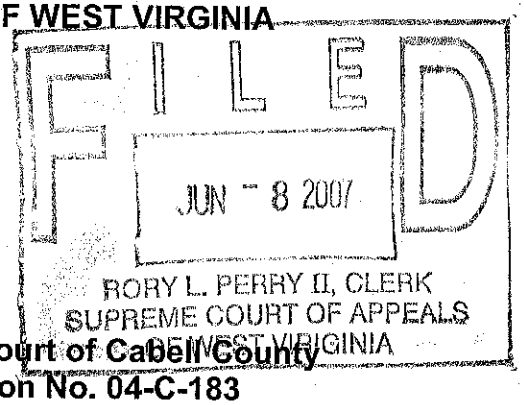
~~No. 062535~~



JONATHAN BRIAN WALKER,

Appellant,

vs.

Circuit Court of Cabell County
Civil Action No. 04-C-183

TARA C. SHARMA, M.D.,

Appellee.

APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Supreme Court of Appeals

United States District Court

United States Supreme Court

Statutes

Rules

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This was a medical professional liability action governed by the July 2003 West Virginia Medical Professional Liability Act, West Virginia Code §55-7B-1 *et seq*, [hereinafter "MPLA"]. The matter was properly dismissed by directed verdict (judgment as a matter of law) after the close of Plaintiff's evidence/case-in-chief at trial.

Appellant, Jonathan Brian Walker filed this lawsuit on February 26, 2004.[1] Appellant contended that the Defendant, Tara C. Sharma M.D., a board-certified urologist with more than thirty (30) years of practice in the field of urology in the Huntington community [hereinafter "Dr. Sharma"], breached the applicable standard of urologic care. Appellant had scar tissue formation obstructing the male urethra such that he had difficulty emptying his bladder. He presented to the hospital in an emergent condition. Dr. Sharma, who had treated the Appellant before for the same problem, Dr. Sharma recommended and the Appellant consent to urologic surgery.[2] There was a surgical complication. The complication was a small tear (that could not ever be seen) between the urethra and rectum. Appellant alleged that the complication occurred as the result of negligence for which damages were sought.

The Complaint was responded to timely by Dr. Sharma. Discovery commenced. It was agreed by all parties that expert testimony was required for the Appellant to establish both the urologic standard of care and proximate causation. *See* Supp. Index, Agreed Order Requiring Expert Testimony, pp. 14. In accordance with the scheduling order and after the deposition of Dr. Sharma, Appellant disclosed one expert witness

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1 It was and remains uncontested that the 2003 MPLA applies and governs this case.

2 There was no claim of failure to obtain informed consent at trial.

Robert I. Lewis, D.O. *See* Supp. Index, Plaintiff's Identification of Expert Witnesses, pp. 16.

Appellant's exclusive claim was whether or not the manner in which Dr. Sharma used a certain urologic instrument set, known as the "Bard method" was within the urologic standard of care. There was no allegation of negligence as to pre-operative care, post-operative care, or as to the timeliness of the detection of the complication. It was undisputed that the Bard method was one of several alternative methods to employ to attempt to relieve urethral obstruction. The sole issue was whether the manner in which Dr. Sharma used the Bard method was correct.

Trial of the matter commenced on April 10, 2006. After selecting a jury, the Appellant called the following witnesses in the following order: Robert Lewis, D.O., Sharon Walker, Bernard Walker and Jonathan Walker. Appellant then and rested his case. Thereafter, Appellee made his Rule 50 motions based upon the absence of competent standard of care testimony, causation testimony and economic damages evidence. *See* Supp. Index, Motion for Judgment as a Matter of Law, pp. 19 and Supp. Index, Trial Transcript, pp.12 and 13 [hereinafter "TT"], *see* TT, pp. 202- 209.

The Trial Court properly granted Appellee's Motion for Judgment as a Matter of Law, *inter alia,* "because Plaintiff failed to meet his burden of proof as to the issue of standard of care and causation." *See* Supp. Index, Judgment Order, pp. 25, ¶ 10.

On September 5, 2006, Appellant filed his Petition for Appeal. On October 18, 2006, this Court granted Appellant's Petition for Appeal. On May 8, 2007, Appellant filed his appeal brief. The Appellee's Response is now filed.

STATEMENT OF FACTS

On Thursday January 3, 2003, Appellant, underwent urologic surgery. Specifically, Appellant had cystoscopic-assisted urethral dilation to relieve/release scar tissue that was occluding the male prostatic urethra. Appendix A to this response is an anatomic rendering of the male urethra-bladder anatomy and surgical instrumentation of the same to release scar tissue obstruction.

Appellant had previously experienced urethral obstruction. In 1995, he presented in the same condition as in 2003 and Dr. Sharma relieved the obstruction employing the Bard method. TT, pp. 43, 74, 80, 83, 92, 119, 151. After the 1995 intervention, Appellant had not sought regular urologic evaluations and in January, 2003, suffered another acute obstructing event. When confronted with an obstruction like this, the cause of which is scar tissue formation, it was undisputed that that the method chosen by Dr. Sharma in attempting to relieve the obstruction, the Bard method, was one of several available and proper methods of intervention. TT. pp. 4, 68-69, 78-80; 92 *see Yates v. University of West Virginia Board of Trustees*, 209 W.Va. 487, 494, 549 S.E. 2d 681, 688 (2001).

Appellant's urologic expert challenged the specific manner in which Dr. Sharma used the instruments involved in the Bard method, hence giving rise to the present dispute. TT, pp. 79-80.

In using the Bard method, first, the urologist takes a cystoscope, an instrument with a light and a camera on the end of it, inserts it into the urethra from its external opening and visually inspects the hollow tube through which urine passes. In this visualization process, the surgeon looks for abnormalities that may be causing or

contributing to the blockage. In this instance, Dr. Sharma found scar tissue and one or more false passages in the same area of the prostatic urethra that had been dilated during the 1995 surgery.

Since the male urethra is a long tube with its internal end terminating in the bladder and the external end, the outside, once any blockage is found the next step if the blockage is due to scar tissue is to pass instruments of increasing size through the hole and scar tissue, causing the scar tissue to tear and open up. In the Bard method, these instruments are known as filliforms and followers. A small, flexible filliform is first placed under visualization guided by the cystocope into the bladder. Then, the cystoscope is removed and a small follower is threaded over the filliform. After the smallest sized follower is navigated through the obstruction, it is removed and the next largest sized follower is threaded over the filliform. This process is repeated until a semi-rigid filliform about the size of a number 2 pencil in diameter is then threaded over the filliform and into the bladder.

Dr. Sharma successfully placed the filliform and then, several of the followers. When he placed the largest diameter follower, he felt the subject scar tissue release. This was not unexpected. Dr. Sharma then took the follower out and inserted the cystoscope. The cystoscope, which has a continuing flow of saline through it in order to lubricate the urethra as it is being passed, was advanced into the urethra and bladder at which time, Dr. Sharma noted that there was some saline coming from the rectum. He knew that the scar tissue had torn into the rectum and contacted a surgeon to evaluate the complication. *See* Operative Report and Progress Note of Dr. Sharma, attached

hereto and incorporated herein as Exhibit A.[3] The surgeon evaluated the rectum and found no hole. He found a reddened area that could have represented a perforation. *See* Operative Note, attached hereto and incorporated herein as Exhibit B. In order to avoid complication, a temporary diverting colostomy was created which was later reversed.

The sole issue at trial was whether the manner in which Dr. Sharma employed the Bard method was appropriate and within the urologic standard of care. The trial court correctly directed this verdict where, as here, Appellant's expert had no experience with the Bard method while recognizing that it was one of several alternative available methods to employ and where Appellant's expert conceded he would have to assume as to that which constitutes the applicable standard of care in these clinical circumstances.

The Trial Court properly directed the verdict at the close of Plaintiff's case and this Supreme Court of Appeals should so affirm.

STANDARD OF REVIEW

When applying the governing law of this case, as is the standard for appellate review, the decision of the Circuit Court of Cabell County should be affirmed. "The appellate standard of review for granting of a motion for [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*." Syl. Pt. 1, *Kiser v. Caudill*, 210 W.Va. 191, 557 S.E. 2d 245 (2001), *citing* Syl. Pt. 3, *Brannon v. Rifle*, 197 W.Va. 97, 475 S.E. 2d 97 (1996). "On appeal, this court, after considering the

[3] While not a part of the trial record but a part of the record below, Dr. Sharma made a typographical error in proof reading the operative note. The operative note reads that the filliform did not go into the bladder. Dr. Sharma failed to correct this sentence of the typist's note because it should read "the filliform did go into the bladder."

evidence in the light most favorable to the nonmovant party, will sustain the granting of [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting [judgment as a matter of law] will be reversed." *Id.*

As did the Court-Below, even with consideration of the evidence in the light most favorable to the Appellant, judgment as a matter of law was proper for absence of competent expert testimony of the national standard of care and hence, an absence of establishing the *prima facie* elements of a medical professional liability action.

ARGUMENT

I. THE RULING OF THE TRIAL COURT WAS A PROPER AND CORRECT APPLICATION OF LAW. APPELLANT LACKED EXPERT TESTIMONY TO ESTABLISH THE NATIONAL STANDARD OF CARE FOR A UROLOGIST EMPLOYING AN ACCEPTABLE METHOD, THE BARD METHOD, OF RELIEVING URETHRAL OBSTRUCTION.

The Trial Court correctly applied the law governing expert testimony in medical professional liability cases. Appellant's expert had no knowledge or experience with the Bard method through trial and conceded that he could only assume as to that which constituted the standard of care for urologist acting under the same or similar circumstances. The law requires more than assumption. The law requires knowledge and experience of the standard of care in the applicable circumstances. In this case, the circumstances were defined by urethral obstruction for which the Bard method was employed to relieve the obstruction.

In 2003, the West Virginia legislature recognized and codified precise requirements for a plaintiff to establish the applicable standard of care, in recognition of the developed common law rule that any medical malpractice expert must be

knowledgeable of the national standard of care. W. Va. Code §§ 55-7B-3, 55-7B-7 (2003); *Arbogast v. Mid-Ohio Valley Medical Corp.*, 214 W. Va. 356, 360-61, 356 S.E.2d 498, 502-03 (2003), *citing* Syl. Pt. 1, *Paintiff v. City of Parkersburg*, 176 W. Va. 469, 345 S.E.2d 564 (1986). This lawsuit was filed in 2003 and it has been undisputed that the 2003 Act applies to this case.

Appellant recognized, by agreed order, that in order to recover for injury arising out of the urethral surgery, it was necessary to present expert testimony establishing specific fundamental legal predicates as to standard of care and causation. Supp. Index, pp. 14.

The law requires that:

> (a) The following are ***necessary elements of proof*** that an injury or death resulted from the failure of a health care provider to follow ***the*** accepted standard of care:
>
> > (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs **acting in the same or similar circumstances**; and
> >
> > (2) Such failure was a proximate cause of the injury or death.

W. Va. Code §55-7b-3 (emphasis added). It is the plaintiff that bears the burden of proving, by competent expert testimony, that the accused health care provider exhibited a lack of skill giving rise to negligence and that the negligence proximately caused the injuries suffered. *Bellomy v. U.S.*, 888 F. Supp. 760, 764 (S.D.W.Va. 1995), *citing Hicks v. Chevy,* 178 W. Va. 118, 121, 358 S.E.2d 202, 205 (1987); Syl. Pt. 2, *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985); Syl. Pt. 1, *Hinkle v. Martin*, 163 W. Va. 482, 256 S.E.2d 768 (1979); Syl. Pt. 4, *Hundley v. Martinez*, 151 W. Va. 977, 158 S.E.2d 159 (1967); Syl. Pt. 1 *Schroeder v. Adkins*, 149 W.Va. 400, 141 S.E.2d 352

(1965); Syl. Pt. 1, *Roberts v. Gale*, 149 W. Va. 166, 249 S.E.2d 272 (1964); *White v. Moore*, 134 W. Va. 806, 62 S.E.2d 122 (1950); Syl. Pt. 2, *Dye v. Corbin*, 59 W. Va. 266, 53 S.E.147 (1906).

In application of the law to Appellant's best evidence at trial, the irrefutable correctness of the trial court's ruling is clear. As discussed in greater detail herein, Dr. Lewis lacked the competency to discuss whether Dr. Sharma met or deviated from the applicable standard of care under the same or similar circumstances since he did not know that which was required by the governing national standard of care and lacked experience or knowledge of the Bard method, notwithstanding his admission that use of the Bard method was an appropriate choice by Dr. Sharma. Mere assumption or innuendo does not constitute a deviation from the applicable standard of care. Knowledge gained only in the context of litigation does not meet the threshold requirement of competency "under the same or similar circumstances." W. Va. Code §55-7B-3; *Hicks v. Chevy,* 178 W. Va. 118, 121, 358 S.E.2d 202, 205 (1987); Syl. Pt. 2, *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985); Syl. Pt. 1, *Hinkle v. Martin*, 163 W. Va. 482, 256 S.E.2d 768 (1979); Syl. Pt. 4, *Hundley v. Martinez*, 151 W. Va. 977, 158 S.E.2d 159 (1967); Syl. Pt. 1 *Schroeder v. Adkins*, 149 W.Va. 400, 141 S.E.2d 352 (1965); Syl. Pt. 1, *Roberts v. Gale*, 149 W. Va. 166, 249 S.E.2d 272 (1964); *White v. Moore*, 134 W. Va. 806, 62 S.E.2d 122 (1950); Syl. Pt. 2, *Dye v. Corbin*, 59 W. Va. 266, 53 S.E.147 (1906).

I.A. THE LAW OF THIS CASE, BY AGREED ORDER BETWEEN THE PARTIES, REQUIRED EXPERT TESTIMONY FOR APPELLANT TO SHOW DUTY, BREACH AND CAUSATION

Appellant was represented by competent and experienced trial counsel. The predicates for expert competency, as set forth in West Virginia Code §55-7B-7 were

known and of record as of and through the date of this trial.

> (a) The applicable standard of care and a defendant's failure to meet the standard of care, if at issue, ***shall be established*** in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court.

West Virginia Code §55-7B-7 (2003). At a *Daniels* conference held early in the case, the parties agreed that expert testimony was required for Appellant to meet his evidentiary burden as to standard of care and causation. Supp. Index, pp. 14; *Daniel v. CAMC*, 209 W.Va. 203, 544 S.E.2d 905 (2001).

I.B. DR. LEWIS LACKED FUNDAMENTAL COMPETENCY OR KNOWLEDGE OF THE NATIONAL STANDARD OF CARE.

An expert witness must possess more than a personal opinion regarding an alleged act of medical negligence. *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999). An expert testifying in medical professional liability cases must possess the fundamental knowledge and expertise in the subject at issue as well as the national standard of care. W. Va. Code §55-7B-7(a); *Kiser v. Caudill*, 201 W.Va. 191, 557 S.E.2d 915 (1999); *Gilman v. Choi*, 185 W.Va. 177, 406 S.E.2d 200 (1990), *overruled on other grounds by Mayhorn v. Logan Medical Found.*, 193 W.Va. 42, 454 S.E.2d 87 (1994). It is axiomatic that, in order to offer testimony it must be shown that,

> (3) ***the expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed;*** (4) the expert witness maintains a current license to practice medicine with the appropriate licensing authority of any state of the United States: *Provided,* That the expert witness' license has not

> been revoked or suspended in the past year in any state; and (5) ***the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient.*** If the witness meets all of these qualifications and devoted, at the time of the medical injury, sixty percent of his or her professional time annually to the active clinical practice in his or her medical field or specialty, or to teaching in his or her medical field or specialty in an accredited university, there shall be a rebuttable presumption that the witness is qualified as an expert . . .

W. Va. Code §55-7B-7(a) (emphasis added).

Plaintiff defined the issue presented: whether the manner in which Dr. Sharma used the Bard method was appropriate and within the urologic standard of care? Dr. Lewis admitted that he lacked any first hand knowledge or expertise with the Bard method and that he would have to assume as to what constitutes the national standard of urologic care when using the Bard method. The Circuit Court properly ruled that Appellant had not met her burden of showing medical negligence in this instance.

Dr. Lewis, Appellant's sole expert witness, testified the following as to the specific issue, use of the Bard method, which defines that which constitutes the same or similar circumstances.

I.B.1. DR. LEWIS HAD NO EXPERTISE IN USE OF THE BARD METHOD. HE HAD NEVER USED THE BARD METHOD, EVEN THROUGH TRIAL.

Appellant can not overcome the basic fact that Dr. Lewis could not stand in Dr. Sharma's shoes and could not testify as to whether or not the manner in which Dr. Sharma employed the Bard method constituted a deviation from the standard of urologic care. Dr. Lewis had no knowledge of the Bard method before litigation. Dr. Lewis had no experience or actual clinical use in the Bard method even through trial.

The first time he learned of the Bard method was after the case was filed and in preparation for his deposition.

Q. Now, with respect to the method employed by Dr. Sharma with the filiform follower system, you have never used this Bard set up?

A. That's correct.

TT, pp. 80; *see also*, pp. 45 and 81-83.

Q, So to present date, you have no experience with this instrument?

A. That is true.

TT, pp. 83.

Q. ...As of January of 2004 [when the certificate of merit was signed in this case], you had not seen this package insert, had you, this Bard Heyman filiform and follower system, right?

A. Is that part of my deposition, because I don't recall exactly when I got the Hymen dilator.

Q. If you look at page 11 of your first deposition, sir.

A. Okay.

Q. The deposition was January 24th, 05? [the screening certificate of merit was in January, 2004]; [See Complaint, Index pp. 1.]

A. That is correct.

Q. Look at line 21. I asked you when did you buy it [the Bard kit]?

A. And I said, "Okay. Probably in the four to six months prior to the date of the – prior to the date of this deposition."

TT, pp. 82-83.

With those concessions, he admitted that he must assume as to the national standard of care and did not testify that Dr. Sharma deviated from the national standard of care. *Id.* :

Q. Sir, my question is, with respect to the instrumentation that a surgeon may use – and we'll get to direct vision in a moment. Other than Columbus Ohio and where you practice, you can't say what methods are used here in West Virginia or at Duke University or at other institutions; isn't that true?

A. I can tell you what goes on in Columbus, Ohio directly because that's where I practice. I've never practiced in West Virginia, but I would assume the standards of practice here are the same as anywhere else.

TT, pp. 78-80.

West Virginia Code §55-7B-7(a) expressly provides that in order to establish the national standard of care, an expert witness must possess the specialized knowledge and expertise in the issue presented. Dr. Lewis could not meet this fundamental threshold, having never used a method that Dr. Sharma had employed for years, not to forget the fact that Dr. Sharma had employed the exact same method ten years prior with this patient. A mere complication does not equal negligence the same as mere opinion does not support qualification to offer an opinion. West Virginia Code §55-7B-7(a); *Hicks v. Chevy,* 178 W. Va. 118, 121, 358 S.E.2d 202, 205 (1987); Syl. Pt. 2, *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985); Syl. Pt. 1, *Hinkle v. Martin*, 163 W. Va. 482, 256 S.E.2d 768 (1979); Syl. Pt. 4, *Hundley v. Martinez*, 151 W. Va. 977, 158 S.E.2d 159 (1967); Syl. Pt. 1 *Schroeder v. Adkins*, 149 W.Va. 400, 141 S.E.2d 352 (1965); Syl. Pt. 1, *Roberts v. Gale*, 149 W. Va. 166, 249 S.E.2d 272 (1964); *White v. Moore*, 134 W. Va. 806, 62 S.E.2d 122 (1950); Syl. Pt. 2, *Dye v. Corbin*, 59 W. Va. 266, 53 S.E.147 (1906).

The Circuit Court's ruling was proper and should be affirmed by this Court. Syl. Pt. 1, *Kiser v. Caudill*, 210 W.Va. 191, 557 S.E. 2d 245 (2001), *citing* Syl. Pt. 3, *Brannon v. Rifle*, 197 W.Va. 97, 475 S.E. 2d 97 (1996).

II. THE RULING OF THE TRIAL COURT WAS PROPER WHERE, AS HERE, APPELLANT'S EXPERT OFFERED NO OPINION SPECIFIC TO THE HEALTH CARE PROVIDER DEFENDANT AND OFFERED TESTIMONY ONLY AS HYPOTHETICAL OPINIONS ONLY.

As the Circuit Court recognized and as long-established by this Supreme Court of Appeals, the law of medical malpractice requires an actual showing that some act or omission by the accused health care provider was a breach of the applicable standard of care and caused the specific harm complained of in the litigation. *See e.g., Hicks v. Chevy,* 178 W. Va. 118, 121, 358 S.E.2d 202, 205 (1987); Syl. Pt. 2, *Totten v. Adongay,* 175 W. Va. 634, 337 S.E.2d 2 (1985); Syl. Pt. 1, *Hinkle v. Martin*, 163 W. Va. 482, 256 S.E.2d 768 (1979); W.Va. Code §55-7B-3(2003). Removing all ambiguity and even serving as an outline, the 2003 MPLA provides:

> Expert testimony ***may only be admitted in evidence if the foundation therefore is first laid*** establishing that: (1) The opinion is actually held by the expert witness; (2) the opinion can be testified to with reasonable medical probability;

West Virginia Code §55-7B-7 (2003).

Throughout his presentation, Dr. Lewis was asked hypothetical questions only. At no time did Dr. Lewis testify that (a) Tara Sharma, M.D. breached the urologic standard of care and what the breach consisted of or (b) that as the result of a breach of the urologic standard of care by Dr. Sharma, injury (a rectal perforation) occurred. TT, 28-115. Even viewing the evidence in the light most favorable to the Appellant, the closest Dr. Lewis he got was the following dialogue:

> Q. Now, hypothetically, let's assume for the moment, is it your opinion that the most likely mechanism for this injury [the rectal perforation] to cause this injury was the fact that the catheter, the filiform was not in the bladder.
>
> A. Yes.

Q. In other words, the train tracks were somewhere else.

A. That is correct.

Q. With this system, where would it go? How can that occur?

A. It's possible that it could have just curled up on itself and – I have to describe this. Can I go up to the picture again?

...

We know – well you will know once the testimony of the operative surgeon who did the urethroplasty that that there was a space between the structure and the muscle. So somewhere back here it's possible that as this type of system is inserted it could actually curl up and fold over on its own. That's one mechanism that can occur.

And unknown is whether or not there may have been a false passage already here in which the catheter went through that false passage and could have been residing between the rectum and prostate. That is also a possibility that it could have been there.

TT, pp. 61-62. Dr. Lewis did not testify that any of these scenarios occurred in this case or that any of these scenarios occurred because Dr. Sharma was negligent or that any of these three scenarios happen only because of negligence. TT, pp. 28-115.

The only time that Dr. Lewis testified that there was a deviation from the standard of care was in response to a line of questioning which Dr. Lewis stated *did not apply* in this case:

Q. Hypothetically, Dr. Lewis, we heard your opinion – **and is it your opinion that the most likely mechanism of this injury was the catheter not being in the bladder?**

A. Yes.

Q. Okay. **Hypothetically, assume with me for the moment that the catheter was in the bladder. Is there a mechanism, alternative mechanism by which this injury could have occurred?**

A. Yes.

Q. And would you describe that for the jury?

A. Once again going back to may analogy, we have train on the track. The train is approaching a curve. If the speed of the train is too fast, it can leave the track and end up derailing. The same this can occur here.

I was asked to present a hypothetical meaning the catheter was inside the bladder. If during the dilation, too much force is placed on this or if it's rapidly placed over it – keep in mind this is soft. I'm going to hold it there. As this is coming down, if on uses the incorrect – I'm sorry, I'll hold it this way. If one uses the incorrect amount of force, this will leave the track and push like that. The result is the same, rectal injury. **So you have to be very gentle to that this will follow its way in. But I was asked to present a hypothetical and, therefore, if one uses too much force, it ends up in the rectum.**

Q. And, Doctor, **if hypothetically that was the mechanism by way this occurred, would the application of this kind of force, in your opinion, be below applicable standards of care.**

A. Yes.

TT, pp. 62-64 (emphasis added).

An expert must offer an opinion as to that which constituted the negligent act or omission of the defendant health care provider. West Virginia Code §55-7b-3, requires:

> (a) The following are ***necessary elements of proof*** that an injury or death resulted from the failure of a health care provider to follow ***the*** accepted standard of care:
>
> > (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs **acting in the same or similar circumstances**; and
> >
> > (2) Such failure was a proximate cause of the injury or death.

W. Va. Code §55-7b-3 (emphasis added). It is the plaintiff that bears the burden of proving, by competent expert testimony, that the accused health care provider exhibited

a lack of skill giving rise to negligence and that the negligence proximately caused the injuries suffered. *Bellomy v. U.S.*, 888 F. Supp. 760, 764 (S.D.W.Va. 1995) *citing Hicks v. Chevy,* 178 W. Va. 118, 121, 358 S.E.2d 202, 205 (1987); Syl. Pt. 2, *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985); Syl. Pt. 1, *Hinkle v. Martin*, 163 W. Va. 482, 256 S.E.2d 768 (1979); Syl. Pt. 4, *Hundley v. Martinez*, 151 W. Va. 977, 158 S.E.2d 159 (1967); Syl. Pt. 1 *Schroeder v. Adkins*, 149 W.Va. 400, 141 S.E.2d 352 (1965); Syl. Pt. 1, *Roberts v. Gale*, 149 W. Va. 166, 249 S.E.2d 272 (1964); *White v. Moore*, 134 W. Va. 806, 62 S.E.2d 122 (1950); Syl. Pt. 2, *Dye v. Corbin*, 59 W. Va. 266, 53 S.E.147 (1906).

Dr. Lewis could not offer any deviation opinion because he lacked the fundamental knowledge or expertise of the Bard method. Assuming, *arguendo* this Court over objection would consider otherwise, even with this degree of leniency in evaluation of Appellant's trial record, there was no specific testimony by Dr. Lewis that Dr. Sharma breached the standard of care in his care and treatment of the Appellant or that any breach by Dr. Sharma caused or contributed to Appellant's injury, rectal perforation. *Farley v. Shook*, 218 W.Va. 680, 629 S.E.2d 739 (2006),

The trial court was correct in its finding that Appellant had failed to meet his evidentiary burden of proof and as a matter of law, judgment for the Appellee was and remains, appropriate.

III. WHERE AN EXPERT CONCEDES THAT MULTIPLE METHODS OF TREATMENT ARE RECOGNIZED BY AUTHORITATIVE MEDICAL TREATISES, THAT ONE OF THOSE MULTIPLE METHODS WAS USED, THAT THE ACCUSED HEALTH CARE PROVIDER'S CHOICE OF THAT METHOD WAS APPROPRIATE AND THAT THE HEALTH CARE PROVIDER IS IN THE BEST POSITION TO STATE WHAT CAUSED THE COMPLICATION, DIRECTED VERDICT IS PROPER.

In West Virginia, "A doctor is not negligent if he selects one of several or more approved methods of treatment within the standard of care." *Yates v. University of West Virginia Board of Trustees*, 209 W.Va. 487, 494, 549 S.E. 2d 681, 688 (2001). In *Yates*, this Court stated that a defendant may rely upon the common law doctrine of multiple methods of treatment provided that the defendant establish that the method employed by the health care provider in the circumstances presented is a method recognized in authoritative medical literature. *Id.* at 495 and 689.

Where, as here, a plaintiff's expert agrees that the method chosen by the defending health care provider is one of multiple available methods, mere complication is use of that method cannot standing alone constitute breach of the standard of care or causation. *Yates v. University of West Virginia Board of Trustees*, 209 W.Va. 487, 494, 549 S.E. 2d 681, 688 (2001); TT. pp. 78- 80.

Furthermore, where the plaintiff's expert lacks the experience or knowledge of the method chosen by the defendant health care provider, and the only evidence to be presented concerning that method is by and through the defendant health care provider, Appellant has not met the requisite showing of malpractice and judgment as a matter of law is warranted. W. Va. Code §55-7b-3; *Gentry v. Mangum,* 195 W.Va. 512, 466 S.E.2d 171 (1995).

IV. APPELLANT ERRONEOUSLY CONTESTED DIRECTED VERDICT BASED UPON THE DOCTRINE OF *RES IPSA LOQUITUR*. THIS IS NOT A RES IPSA LOQUITUR CASE AND THE TRIAL CORRECT CORRECTLY SO RULED.

The doctrine of *res ipsa loquitur* and the plaintiff's burden of proof when relying upon this doctrine was recently discussed in *Kyle v. Dana Transport, Inc.* --- S.E.2d --- , 2007 WL 1461163 (W.Va.)

Pursuant to the doctrine of *res ipsa loquitur*:

> it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is the kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Kyle v. Dana Transport, Inc. --- S.E.2d --- , 2007 WL 1461163 (W.Va.), *citing Foster v. City of Keyser*, 202 W.Va. 1, 4, 501 S.E.2d 165, 168 (1997). "In order to avoid summary judgment or judgment as a matter of law, a plaintiff who seeks to proceed on a theory of *res ipsa loquitur* must demonstrate each of the three prongs of *Foster* as a predicate to application of he evidentiary rule of *res ipsa loquitur*. *See Foster*, 202 W.Va. at 4, 501 S.E.2d at 168, syl.pt.4." *Kyle v. Dana Transport, Inc.* --- S.E.2d --- , 2007 WL 1461163 (W.Va.).

Appellant contends that the *res ipsa loquitur* theory entitles him to survive judgment as a matter of law as to the causation element of proof. Appellant is wrong.

Appellant's causation theory was predicated upon hypothetical assumptions only, without any offered testimony that a specific act or omission by Dr. Sharma proximately caused injury. *E.g.*, TT, pp. 61-64; *see* Section II, *supra*.

Key to the *res ipsa* doctrine is the absence of any alternative inference for the outcome. Where there exists an alternative competing inference as to the cause of injury, the *res ipsa* doctrine does not apply. The *Res ipsa loquitur* doctrine requires that, "other responsible causes are sufficiently eliminated." *Kyle v. Dana Transport, Inc.* --- S.E.2d --- , 2007 WL 1461163 (W.Va.) By Dr. Lewis' own testimony, that which was causing the obstruction in Appellant's urethra was scar tissue. In order to relieve the scar tissue it had to be opened by dilation. The alternative inference that instrumentation alone can cause this outcome was presented through the trial inquiry of Appellant's witnesses. *See* TT, pp. 57-62.

Further, as discussed in Section I supra, expert testimony must be linked to the alleged health care provider, a specific deviation or deviations with which the expert has the competence to testify, and causation. West Virginia Code §55-7B-3(2); *Hicks v. Chevy,* 178 W. Va. 118, 121, 358 S.E.2d 202, 205 (1987); Syl. Pt. 2, *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985); Syl. Pt. 1, *Hinkle v. Martin*, 163 W. Va. 482, 256 S.E.2d 768 (1979); Syl. Pt. 4, *Hundley v. Martinez*, 151 W. Va. 977, 158 S.E.2d 159 (1967); Syl. Pt. 1 *Schroeder v. Adkins*, 149 W.Va. 400, 141 S.E.2d 352 (1965); Syl. Pt. 1, *Roberts v. Gale*, 149 W. Va. 166, 249 S.E.2d 272 (1964); *White v. Moore*, 134 W. Va. 806, 62 S.E.2d 122 (1950); Syl. Pt. 2, *Dye v. Corbin*, 59 W. Va. 266, 53 S.E.147 (1906). There was no exclusion of alternative inferences.

Dr. Lewis' personal opinion, acquired through an internet "google search" that a perforation occurring when use of the Bard method was employed, was appropriately disregarded by the Trial Court. "Google" is not an authoritative source. Dr. Lewis never testified that a specific act by Dr. Sharma was the proximate cause of the perforation.

Dr. Lewis nor Appellant presented evidence that the underlying condition alone would not lead to this complication. Alternative inferences existed. *Res ipsa loquitur* simply did not apply as the evidence so existed in this case.

RELIEF REQUESTED

Wherefore, the Circuit Court's directed verdict/judgment as a matter of law was proper and should not be reversed on appeal.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 062535

JONATHAN BRIAN WALKER,

Appellant,

vs.

Circuit Court of Cabell County
Civil Action No. 04-C-183

TARA C. SHARMA, M.D.,

Appellee.

Counsel for the Appellee, Tara C. Sharma, M.D., do hereby certify that the foregoing, ***Appellee's Brief in Opposition to Appellant's Appeal***, was served upon the following counsel of record via Facsimile, this 8th day of June, 2007.

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